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No. 00-214

Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

QWEST CORPORATION,
*Petitioner,*

v.

MCI TELECOMMUNICATIONS CORPORATION,
*Respondents.*

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QWEST CORPORATION,
*Petitioner,*

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., *et al.*,
*Respondents.*

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QWEST CORPORATION,
*Petitioner,*

v.

SPRINT COMMUNICATIONS CO. L.P., *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF IN OPPOSITION

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## INTRODUCTION

Qwest Corporation[1] asks this Court to grant its Petition for a Writ of Certiorari to review decisions of the Ninth Circuit Court of Appeals, in which that court affirmed decisions of the Washington Utilities and Transportation Commission ("WUTC") regarding US West's obligation to open its local telecommunications network to new competitors under the Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et seq.* ("1996 Act"). *See MCI Telecommunications Corp. v. US West Communications, Inc.*, 204 F.3d 1262 (9th Cir. 2000). US West argues that there are conflicts between the Ninth Circuit and two circuit courts of appeals exercising Hobbs Act[2] review of orders by the Federal Communications Commission ("FCC"). US West also argues that the Ninth Circuit misinterpreted and misapplied the provision in the 1996 Act that authorizes federal court review of state commission determinations, 47 U.S.C. § 252(e)(6).

This case is not about the Hobbs Act or the supremacy of federal law. Rather, this case involves the WUTC's straightforward implementation of the pro-competitive policies of the 1996 Act.[3] The WUTC is

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[1]US West Communications, Inc., has been renamed Qwest Corporation as a result of a merger. Like the petitioner, the Commission will use the name "US West" to be consistent with the name used below.

[2]28 U.S.C. §§ 2341 *et seq.*

[3]The 1996 Act is designed to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . ." H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 113 (1996); *see AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999).

charged by the 1996 Act to effect the obligations of incumbent companies, such as US West, to interconnect their facilities with those of competitors in the local market. There is neither conflict among the circuit courts of appeals nor inconsistency between the decisions of the Ninth Circuit and this Court. The Court should deny the Petition.

## STATEMENT

### A. The Requirement for Interconnection Between Telecommunications Companies Under the 1996 Act

This case arose out of the procedure under the 1996 Act by which incumbent local exchange telecommunications companies ("incumbent companies"), such as US West, are required to enter into "interconnection agreements" with their competitors. Through these agreements, competitors may acquire access to elements of the incumbents' telecommunications networks so they can compete with the incumbents in the local telephone market. 47 U.S.C. § 251(c)(3). This case involves three such agreements entered into between US West and competitors MCI Telecommunications Corporation ("MCI"), AT&T Communications of the Pacific Northwest, Inc. ("AT&T"), and Sprint Communications Company, L.P. ("Sprint"), respectively.

Interconnection agreements must contain the particular terms and conditions necessary for the incumbents to fulfill their statutory duties. *Id.* § 251(c)(1). Congress assigned to state public utility commissions, like the WUTC, the primary role in implementing the interconnection agreements. For example, although the incumbent company and the competitors are required to negotiate interconnection agreements in good faith, *id.*, if the parties are unable to resolve all issues through negotiation, a party to the

negotiation may request the state commission to arbitrate the open issues. *Id.* § 252(b)(1).[4]

In addition to their role as arbitrators under the 1996 Act, state commissions must approve all interconnection agreements regardless of whether the agreements are reached through negotiation or arbitration. *Id.* § 252(e)(1). However, the statutory criteria the state commission must apply in its review of an agreement differ depending on whether the agreement, or portion of the agreement, was reached by negotiation or arbitration. If an agreement was negotiated, a state commission may reject it, "or any portion thereof," only if the agreement or provision discriminates against a carrier not a party to the agreement or if the agreement or provision is not consistent with the public interest, convenience, or necessity. *Id.* § 252(e)(2)(A). On the other hand, if the agreement or provision was arbitrated, the state commission has somewhat wider latitude. In that situation, the state commission may reject the agreement or provision only if "it finds that the agreement does not meet the requirements of section 251 [of the 1996 Act], including the regulations prescribed by the Commission [FCC] pursuant to section 251, or the standards set forth in subsection (d) of this section." *Id.* § 252(e)(2)(B). The 1996 Act also preserved the authority of a state commission to establish or enforce "other requirements of State law in its review of an agreement . . . ." *Id.* § 252(e)(3).[5]

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[4]The WUTC is authorized by the Washington state legislature to take actions, conduct proceedings, and enter orders as permitted or contemplated for state commissions under the 1996 Act. Wash. Rev. Code § 80.36.610(1).

[5]In 1985, the Washington state legislature passed the Regulatory Flexibility Act, Washington Laws of 1985, ch. 450, p. 1976, codified at several places in Title 80 Wash. Rev. Code, which authorized easy registration of telecommunications companies seeking to operate in Washington, and declared the state policy to promote diversity of supply

The 1996 Act specifically preempted state court review of a state commission action, *id.* § 252(e)(4), and assigned the task of judicial of review of state commission decisions to the United States District Court. *Id.* § 252(e)(6) ("[A]ny party aggrieved by such [state commission] determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.").

This case is the result of a challenge by US West to the WUTC's approval of the interconnection agreements between US West and MCI, A&T, and Sprint, and the subsequent review of that approval in the federal courts. While US West's initial challenges to the agreements were broad-based, the issues presented to this Court involve the relationship and status of certain FCC rules to the agreements and the lower court decisions affirming the WUTC.

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for telecommunications services. *See* Wash. Rev. Code §§ 80.36.300(5); .350.

In 1994, the Washington Supreme Court removed a historical barrier to local telephone competition by rejecting arguments that exclusive franchise service areas in the telecommunications industry were the law in Washington. *Electric Lightwave, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 530, 869 P.2d 1045 (1994). The court recognized that granting monopolies would run counter to the state policy promoting competition. *Id.* at 538-39 (citing Wash. Rev. Code § 80.36.300(5)).

Foreshadowing the 1996 Act, in order to foster emerging local competition, the WUTC entered an order setting forth the terms and conditions under which competitors for local exchange service will interconnect their networks with incumbents. *WUTC v. US West Communications, Inc., et al.*, Consolidated Docket Nos. UT-941464, -941465, -950146, -950265, 1995 WL 735315 (WUTC Oct. 31, 1995) (petition for judicial review stayed, King County Superior Court, No. 96-2-08435-2SEA). In that order, the WUTC determined that the transition to competitive markets would be accomplished largely through access to unbundled network elements and resale of services. *Id.* at *40-41. Therefore, the WUTC exercises its role to effect the pro-competitive policies, both under the 1996 Act and under pre-existing state law.

### B. The FCC's Local Competition Rules and the *Iowa Utilities Board* Litigation Before the Eighth Circuit and This Court

In approving an arbitrated agreement or provision, the state commission must determine if it conforms with FCC rules. 47 U.S.C. § 252(e)(2)(B).[6] Following the passage of the 1996 Act, the FCC promulgated regulations to implement the local competition provisions of the Act, including those relating to interconnection and access to unbundled network elements. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("Local Competition Order"). These regulations specified which telecommunications "network elements" an incumbent must make available to its competitors. A network element is a facility or equipment used in the provision of a telecommunications service. 47 U.S.C. § 153(29). For example, a "switch" routes the call and is connected to the local "loop," which runs from a customer's place of use to the switch.[7]

In these rules, the FCC imposed at least three separate provisioning requirements for unbundled network elements. First, it required incumbents to provide unbundled network elements in a manner that would allow competitors to

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[6]However, with regard to agreements, or portions of agreements, that are adopted by negotiation, the state commission need not apply the FCC rules. Rather, in such cases, the state commission may reject the agreement, or portion thereof, only if it determines that it is not consistent with the public interest or discriminates against a carrier not a party to the agreement. 47 U.S.C. § 252(e)(2)(A).

[7]Simply speaking, a "switch" is "a mechanical, electrical or electronic device which opens or closes circuits, completes or breaks an electrical path, or selects paths or circuits." NEWTON'S TELECOM DICTIONARY, 757 (15th ed. 1999). The "local loop" is the physical connection from the customer's premises to the local exchange company's central office. *Id.* at 465.

combine the elements in order to provide a finished service, 47 C.F.R. § 51.315(a) ("finished service rule"). Second, it prohibited incumbents from separating already-combined network elements, unless otherwise requested by competitors. *Id.* § 51.315(b) ("no separation rule"). Finally, the FCC required incumbents to combine network elements at the request of competitors. *Id.* § 51.315(c)-(f) ("mandatory combination rule"). The mandatory combination rule is a focal point of US West's Petition.

Numerous parties, including US West, petitioned for judicial review of the Local Competition Order. These cases were consolidated in the Eighth Circuit Court of Appeals. The Eighth Circuit temporarily stayed the entire body of the FCC's rules, *Iowa Utils. Bd. v. Federal Communications Comm'n*, 109 F.3d 418, 421 (8th Cir. 1996), and ultimately, the Eighth Circuit stayed only selected rules but left the finished service, no separation, and mandatory combination rules intact. *Id.* at 427 & n.8.[8]

In its review of the FCC's rules, the Eighth Circuit vacated the mandatory combination rule, 47 C.F.R. § 51.315(c)-(f). *Iowa Utils. Bd. v. Federal Communications Comm'n*, 120 F.3d 753, 813 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). On rehearing, the Eighth Circuit also vacated Rule 315(b), the no separation rule. *Id.*

On January 25, 1999, this Court affirmed in part and reversed in part the Eighth Circuit's decision. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). With respect to the FCC's no separation rule, the Supreme Court reversed the Eighth Circuit's decision that Rule 315(b) violates the Act and reinstated that rule. *AT&T Corp.*, 525 U.S. at 393-95.

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[8]The Eighth Circuit stayed the FCC's rules establishing pricing guidelines for state commissions and the so-called "pick and choose" rules implementing 47 U.S.C. § 252(i). *Iowa Utils. Bd.*, 109 F.3d at 421.

The Court rejected the argument that the Act requires competitors to combine network elements for themselves. The Court remanded the case to the Eighth Circuit for "proceedings consistent with" the opinion. *Id.* at 397. This Court did not rule on the mandatory combination provision in *AT&T Corporation*.

On remand, the Eighth Circuit decided that the mandatory combination rule violates the Act and vacated Rules 315(c)-(f). *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 758-59 (8th Cir. 2000) ("*Iowa Utils. Bd. II*"). Therefore, there is no FCC requirement that incumbent companies must combine network elements at the request of their competitors.

### C. The FCC's Collocation Rules and Proceedings Before the D.C. Circuit

In addition to the requirements for interconnection and access to unbundled network elements, the 1996 Act requires incumbents to permit competitors to collocate "equipment necessary for interconnection or access to unbundled network elements" on the incumbents' premises. 47 U.S.C. § 251(c)(6).[9] In its rules implementing the collocation requirement, the FCC determined that

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[9]The 1996 Act provides for both physical and virtual collocation. 47 U.S.C. § 251(c)(6). "Physical collocation" is the physical placement of a competitor's facilities at the incumbent's premises. The competitor has access to these facilities. "Virtual collocation" occurs when the competitor's facilities are terminated at the incumbent's premises and connected to the incumbent's facilities. The incumbent maintains facilities that are virtually collocated. *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761, 4771, ¶ 19 n.27 (1999), *aff'd in part and rev'd in part and remanded GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000). The 1996 Act states a preference for physical collocation because it conditions virtual collocation on an incumbent's showing to the state commission that physical collocation is not practical for technical reasons or because of limited space. *See* 47 U.S.C. § 251(c)(6).

"necessary" equipment was equipment that is "used or useful" for interconnection or access to unbundled network elements. *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761, 4776-77, ¶ 28 (1999) ("Collocation Order").

Incumbent companies petitioned for review of the Collocation Order in the United States Court of Appeals for the District of Columbia Circuit. *GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000). In its review of the Collocation Order, the D.C. Circuit reversed the FCC's definition of "necessary" as "used and useful," holding it was overly broad for purposes of the collocation requirement set forth in the 47 U.S.C. § 251(c)(6). *Id.* at 422. The FCC's definition, the D.C. Circuit held, would require an incumbent to collocate almost any piece of equipment owned by a competitor. *Id.* at 424.

The D.C. Circuit relied in part on this Court's decision to vacate the FCC's definition of "necessary" for purposes of access to unbundled network elements. *Id.* at 423-24 (citing *AT&T Corp.*, 525 U.S. at 389-90). In *AT&T Corporation*, this Court determined that the FCC, by interpreting the word "necessary" in terms of any increase in cost or degradation of service quality, gave competitors essentially "blanket access" to the incumbents' networks, which was not what Congress had intended. *AT&T Corp.*, 525 U.S. at 389-90. Therefore, the Court vacated the FCC's unbundling rule, 47 C.F.R. § 51.319, and remanded the rule for a more limited definition of "necessary" to be applied when the FCC or state commissions decide which unbundled network elements an incumbent must provide under 47 U.S.C. § 251(c)(3). *Id.* at 390, 397; *see also* 47 U.S.C. § 251(d)(2).

## D. Proceedings Below

### 1. Negotiations Between the Parties and Arbitration of Unresolved Issues Before the WUTC

MCI, AT&T, and Sprint each requested negotiations with US West for interconnection under the 1996 Act. In no case were the parties able to negotiate an entire agreement, therefore, each competitor requested that the WUTC arbitrate the unresolved issues pursuant to 47 U.S.C. § 252(b)(1).

To best fulfill its duty to arbitrate agreements under the 1996 Act, the WUTC adopted "final offer" arbitration, whereby the arbitrators resolved the disputed issues between US West and its competitors by selecting between the parties' last proposals as to each unresolved issue, selecting the proposal that was the most consistent with the requirements of the 1996 Act, state law, and WUTC policy. *See, e.g.*, Pet. App. 118a. Under this approach, the parties have the incentive to approach a middle ground. If neither party to an agreement submitted a final offer that complied with applicable law or policy, the arbitrator would resolve the disputed issue in a manner to assure such compliance. Only the disputed issues were before the arbitrators for decision. Negotiated issues were not subject to arbitration, but were subject to WUTC approval. 47 U.S.C. § 252(e)(1).

In each of the three agreements at issue, the WUTC required US West to combine network elements for the competitors.[10] At the conclusion of their respective

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[10] The interconnection agreement between US West and MCI provides that "US West shall offer each Network Element individually and in combination with any other Network Element or Network Elements in order to permit [MCI] to provide Telecommunications Services to its subscribers." Pet. App. 28a n.3. The agreement between US West and AT&T provides that "AT&T may purchase unbundled network Elements individually or in Combinations without restrictions as to how those elements may be rebundled" and that "AT&T may order and US West shall provision unbundled network elements either individually

arbitrations, the companies had the opportunity to restate any objections to the arbitrators' decisions in oral argument before the commissioners of the WUTC. *See, e.g.*, Pet. App. 99a. The WUTC approved the agreements, but modified the MCI and AT&T agreements to include a provision requiring US West to allow MCI and AT&T to collocate remote switching units[11] on US West's premises. *Id.* at 89a-90a; 94a-95a.

### 2. Federal Court Review of the WUTC's Arbitration Decisions

Pursuant to 47 U.S.C. § 252 (e)(6), US West challenged the WUTC's decision approving the interconnection agreement in the district court, and disputed a whole host of provisions in the agreement. *See* Pet. App. 24a-86a. After the WUTC had issued its decisions approving the agreements, but before the district court issued its orders, the Eighth Circuit vacated the FCC's mandatory combination

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or in combination on a single order. Network Elements ordered as combined shall be provisioned as combined." *Id.* at 59a n.3. Finally, the US West/Sprint agreement contains the following provision:

> "US West agrees to perform and Sprint agrees to pay for the TELRIC costs of the functions necessary to combine requested elements in any technically feasible manner either with other elements from US West's network, or with elements possessed or arranged for by Sprint. However, US West need not combine network elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they are typically combined." *Id.* at 81a-82a n.3.

[11] A remote switching unit, or module, is a small end office switch that depends on a larger host switch for most of its features and functions. The remote switching unit usually is located in another building from the host switch.

rule and the no separation rule. *See Iowa Utils. Bd.*, 120 F.3d at 813; *see also* 47 C.F.R. § 51.315(b)-(f). Relying on the Eighth Circuit's decision, the district court overturned the WUTC's decisions approving the language in the agreements that required US West to combine network elements. *See* Pet. App. 27a-29a; 58a-60a; 81a-83a.

The district court affirmed the WUTC's decisions requiring US West to allow collocation of remote switching units. The court held that the WUTC's decision to require such collocation was not arbitrary and capricious because without it the MCI and AT&T would be at a technical and economic disadvantage. *See* Pet. App. 33a-34a; 65a-66a.

All parties appealed the district court's decisions to the Ninth Circuit. US West appealed, among other issues, the district court's decisions regarding the collocation of remote switching units. The WUTC and the competitors appealed the district court's decisions regarding the combination of network elements. While these cases were pending before that court, this Court issued its opinion in *AT&T Corporation*. In that decision, this Court overturned the Eighth Circuit's invalidation of 47 C.F.R. § 51.315(b). *AT&T Corp.*, 525 U.S. at 393-95. The Court also vacated the FCC's definition of "necessary" as that term is used in 47 U.S.C. § 251(d)(2). 525 U.S. at 387-92.

## REASONS FOR DENYING THE PETITION

### I. The Court Should Not Grant the Petition Regarding the Ninth Circuit's Decision Affirming the Combination Requirements in the Agreements.

US West urges this Court to grant its Petition with respect to the requirement that US West combine network elements at the competitors' request. US West alleges that the Ninth Circuit improperly invaded the jurisdiction of the Eighth Circuit to review the FCC's network element rules, thereby circumventing the policy behind the Hobbs Act, 28 U.S.C. §§ 2341 *et seq.* Pet. at 11-12. US West also

alleges there is a conflict between the circuits regarding the obligations of incumbents to combine network elements at the request of competitors. *Id.* at 11-12. US West asks this Court to grant its Petition even though the Court recently denied US West's Petition for Certiorari to review a similar decision of the Ninth Circuit on nearly identical grounds. *US West Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999), *cert. denied* 120 S. Ct. 2741 (2000), *pet. for reh'g denied* 69 U.S.L.W. 3156 (U.S. Aug. 28, 2000) (No. 99-1641).

### A. There Is No Conflict Among Circuit Courts of Appeal Because the Ninth Circuit's Decision Affirming the Combination Requirements Does Not Implicate the Hobbs Act.

Here, as in the *MFS Intelenet* case, the Hobbs Act is not implicated at all. Contrary to the argument of US West, the Ninth Circuit did not engage in judicial review of the FCC's mandatory combination rules set forth at 47 C.F.R. § 51.315(c)-(f). Under the Hobbs Act, only the Eighth Circuit has jurisdiction "to enjoin, set aside, suspend . . . or to determine the validity of" that rule. 28 U.S.C. § 2342. Consistent with the Hobbs Act, the Ninth Circuit did none of those. In fact, the Ninth Circuit's decision is premised on the fact that Rules 315(c)-(f) are invalid. *MCI Telecommunications Corp.*, 204 F.3d at 1268; Pet. App. 9a. The Eighth Circuit's invalidation of Rules 315(c)-(f) simply left no rule in place requiring incumbent carriers to combine elements. *Id.* Because there was no affirmative FCC requirement that incumbents must combine elements for competitors, the question before the Ninth Circuit became: Did the 1996 Act, in the absence of such rule, prohibit state commissions from requiring an incumbent to combine network elements at the request of its competitors? The Ninth Circuit held that it did not. *Id.* Because the FCC's combination rules were not before the Ninth Circuit for either

interpretation or enforcement, that court did not usurp the Eighth Circuit's authority to review the rules. Rather, the Ninth Circuit interpreted the 1996 Act, as guided by this Court's decision in *AT&T Corporation*, and determined that the combination provisions do not violate the Act. The Eighth Circuit's recent reaffirmation of its prior decision to vacate Rules 315(c)-(f) does not affect the *status quo*.

US West's argument boils down to nothing more than its erroneous assertion that the Eighth Circuit, by virtue of its review of the FCC rules, is the only court with jurisdiction to interpret the 1996 Act. This argument is wrong for two reasons.

First, the Ninth Circuit's decision represents exactly what Congress intended when it provided for federal court review over state commission arbitration decisions. *See* 47 U.S.C. § 252(e)(6). Congress did not structure the 1996 Act to provide for review of state commission decisions in a single federal district court. Rather, Congress permitted parties aggrieved by state commission determinations to bring an action in the "appropriate" federal district court. *Id.* Therefore, Congress contemplated that several district courts would review interconnection agreements to determine whether the agreements meet the requirements of Sections 251 and 252 of the Act. *Id.*

Second, while uniformity of federal law is an important consideration, federal district courts are not bound by the decisions issued by other district courts. *See, e.g., Fox v. Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991) (district court is not bound by another district court's decision, or even an opinion by another judge of the same district); *Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1123 (7th Cir. 1987) ("[N]either this court nor the district courts of this circuit give the decisions of other courts of appeals automatic deference; we recognize that, within reason, the parties to cases before us are entitled to our independent judgment."). Congress was well aware that district courts are

not bound by the decisions of other district courts when it provided for review of state commission decisions in the several federal district courts.

It is undisputed that one of the policies behind the Hobbs Act is to ensure that judicial review of federal agency action is conducted by a single circuit court, rather than by many district courts. *See Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 906-07 (1984), *vacated on other grounds* 476 U.S. 1167 (1986). However, this policy of uniform judicial review of federal *rules* does not mean that federal courts must blindly adhere to a sister court's interpretation of federal *statutes*. The Hobbs Act does not require the Ninth Circuit to defer automatically to the Eighth Circuit's interpretation of the 1996 Act. US West's argument that the Hobbs Act empowers the Eighth Circuit with exclusive authority to interpret the 1996 Act is wrong, and does not warrant review by this Court.

### B. There Is No Conflict Among Circuit Courts of Appeals In Their Interpretations of the 1996 Act As It Relates to Interconnection Agreement Provisions That Require an Incumbent to Combine Network Elements.

US West also argues that there is a conflict between the decision of the Ninth Circuit and the Eighth Circuit regarding an incumbent's obligation to combine unbundled network elements. Pet. at 11-14. However, no such conflict exists. The Eighth Circuit, in reviewing the FCC's rules, held that the 1996 Act does not require an incumbent to combine elements at the request of a competitor. *Iowa Utils. Bd. II,* 219 F.3d at 759 (citing *Iowa Utils. Bd.*, 120 F.3d at 813). The Ninth Circuit did not say that the 1996 Act requires an incumbent to combine network elements. Rather, the Ninth Circuit, in its review of interconnection agreements, held that the 1996 Act does not prohibit a requirement that incumbents combine network elements at

the request of competitors. *MCI Telecommunications Corp.*, 204 F.3d at 1268; Pet. App. 9a.

The United States Court of Appeals for the Fifth Circuit also has held that the 1996 Act does not prohibit the inclusion in an interconnection agreement of a provision requiring an incumbent to combine elements. *Southwestern Bell Tel. Co. v. Waller Creek Communications, Inc.*, 221 F.3d 812, 821 (5th Cir. 2000). Following the Eighth Circuit's decision in *Iowa Utilities Board II*, the Fifth Circuit rejected Southwestern Bell's argument that the Eighth Circuit's decision made such a requirement "illegal" or "unlawful." *Southwestern Bell*, 221 F.3d at 820-21. The Fifth Circuit held:

> "[T]here is nothing 'illegal' about the provision requiring [Southwestern Bell] to combine network elements for [competitive providers]. Nothing in the Telecommunications Act forbids such combinations. Even if the Eighth Circuit's decision on this issue is correct - - which we do not decide today - - it does not hold that such arrangements are prohibited; it only holds that they are not required by law." *Southwestern Bell*, 221 F.3d at 821.

Thus, there is no conflict among the circuits regarding whether a provision in an interconnection agreement requiring US West to combine network elements at the request of a competitive provider is prohibited by the 1996 Act. The Court should deny US West's Petition.

### C. In Any Event, State Law Permits the WUTC to Impose a Requirement that US West Combine Network Elements At the Request of the Competitors.

The combination provisions also may be affirmed on the ground that the provisions may be imposed as a matter of

state law. The 1996 Act contemplates that state commissions may impose requirements that are a function of state law in their review and approval of interconnection agreements. *See* 47 U.S.C. §§ 251(d)(3); 252(e)(3). A state commission's decision to order an incumbent to combine network elements for a competitor would not be preempted by the 1996 Act because such a decision would not conflict with the pro-competitive policies of the Act or any if its provisions. *See English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). In addition, by granting states the authority to apply and enforce state law in their approval of agreements, Congress clearly did not preempt the field of local telecommunications regulation. *Id.* at 79.

The WUTC has imposed a combination requirement on incumbent companies as a matter of state law in arbitrating an interconnection agreement in other cases, as well.[12] The fact that state commissions may impose such a requirement under state law is a basis for this Court to deny the Petition.

## II. The Court Should Deny the Petition As to the Ninth Circuit's Decision to Affirm the Provisions in the Agreements That Permit the Competitors to Collocate Remote Switching Units on US West's Premises.

US West asks this Court to grant its Petition as to the requirement that it permit competitors MCI and AT&T to collocate remote switching units on its premises. US West argues that the Ninth Circuit, by affirming this requirement, circumvented the Hobbs Act authority of the D.C. Circuit, created conflict among the circuit courts of appeals, and

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[12] *See, e.g., In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and GTE Northwest Incorporated Pursuant to 47 U.S.C. Section 252*, Docket No. UT-960307, 1998 WL 223213 (WUTC March 16, 1998).

ignored this Court's construction of the 1996 Act. However, the Ninth Circuit's decision to affirm the provisions is consistent with the decisions of this Court and the purpose of the 1996 Act.

### A. There Is No Conflict Among Circuit Courts of Appeals Because the Ninth Circuit's Decision Affirming the Collocation of Remote Switching Units Does Not Implicate the Hobbs Act.

US West argues that the Ninth Circuit erred by applying the FCC's definition of "necessary" -- a definition that was vacated by the D.C. Circuit -- when it affirmed the collocation provisions in the agreements. Pet. at 17; *see also GTE Serv. Corp.* 205 F.3d at 422-424. This argument fails for reasons similar to those set forth above concerning US West's claims regarding combination provisions.

As argued above, the Ninth Circuit is not bound by the D.C. Circuit's interpretation of the Act. Nor must the Ninth Circuit defer to the D.C. Circuit because that court was reviewing the FCC's collocation rules pursuant to the Hobbs Act. As was the case when the Eighth Circuit vacated the FCC's mandatory combination rules, the D.C. Circuit's decision to vacate the FCC's definition of "necessary" simply leaves no FCC definition of what equipment competitors may collocate on incumbents' premises.

In the absence of a binding FCC decision regarding collocation, the Ninth Circuit properly reviewed the collocation provisions of the arbitrated agreements to determine whether they "meet the requirements of" the 1996 Act. *See MCI Telecommunications Corp.*, 204 F.3d at 1268 (quoting 47 U.S.C. § 252(e)(6)); Pet. App. 11a. The Ninth Circuit considered the collocation provisions and determined that such provisions do not violate the 1996 Act. *Id.*

### B. The Ninth Circuit's Decision Regarding the Collocation of Remote Switching Units Does Not Conflict With the Decisions of This Court or Other Circuit Courts of Appeals.

Contrary to the arguments of US West, the Ninth Circuit's decision to affirm the provisions in the agreements that permit MCI and AT&T to collocate remote switching units on US West's premises does not ignore this Court's decision in *AT&T Corporation* vacating the FCC's interpretation of "necessary" as that word is used in 47 U.S.C. 251(c)(3). In that decision, this Court held that the FCC failed to interpret the word "necessary" in a way that would impose some limitations on the unbundled network elements incumbents must provide to competitors. *AT&T Corp.*, 525 U.S. at 388-92. The Court further held that Congress did not intend to require incumbents to provide competitors with "blanket access" to their networks. *Id.* at 390. Therefore, the Court vacated the FCC's specific unbundling requirements. *Id.* at 392. *See also* 47 C.F.R. § 51.319.

The collocation provisions affirmed by the Ninth Circuit do not provide competitors with *carte blanche* to collocate any equipment on US West's premises that they believe will be useful to them. Rather, the agreement provisions ordered by the WUTC allow the competitors to collocate discrete pieces of equipment for the limited purpose of effecting interconnection and access to unbundled network elements. *See discussion infra* pp. 19-20. Therefore, the Ninth Circuit's decision does not result in an overly broad definition of the word "necessary." The concerns about unbridled access to the incumbents' networks that prompted this Court and the D.C. Circuit to vacate the FCC's rules simply are not present in the collocation provision approved by the Ninth Circuit.

The Act requires incumbents, like US West, to provide for physical collocation of competitors' equipment that is necessary for interconnection or access to unbundled network elements at the incumbents' premises. 47 U.S.C. § 251(c)(6). The WUTC ordered US West to permit both MCI and AT&T to collocate remote switching units on its premises. Incumbents must provide interconnection[13] to their competitors that is "at least equal in quality" to the interconnection the incumbent provides to itself or its affiliates or subsidiaries. *Id.* at § 251(c)(2)(C). By requiring the collocation of remote switching units, the WUTC properly implemented the "equal quality" interconnection requirement of the 1996 Act.

US West incorrectly states that the WUTC allowed competitors to collocate remote switching units on its premises because such equipment is "used" for collocation or access to unbundled network elements. Pet. at 16-17. Although the "useful" standard was in effect when it issued its decisions, the WUTC's reasons for requiring such collocation extended beyond the "used and useful" definition.

At the conclusion of the arbitration proceedings, the WUTC decided that US West must permit MCI and AT&T to collocate remote switching units on US West's premises. The WUTC based its decision on the recommendation of its staff that failure to allow for such collocation would result in inferior quality interconnection for the competitors. *See* App. at 1a-5a.

In order to provide local service to their subscribers, competitive local companies must interconnect their networks with the incumbents' networks. Because of their ubiquitous networks, much of this interconnection must be

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[13]"Interconnection" is the physical linking of two networks for the mutual exchange of traffic. *Local Competition Order*, 11 FCC Rcd at 15590, ¶ 176.

done on the incumbents' premises. If a competitor cannot place remote switching units in the incumbent's central office, then the competitor must extend its loops to its own central office. One option is to add copper cable between the incumbent's and competitor's central offices, but this would degrade the service quality. The other option would be to use back-to-back electronic arrangements. However, this also would degrade the quality of service to the customer. *See id.* at 4a, 8a. The WUTC's decision to require collocation of remote switching units assures that MCI and AT&T will receive interconnection that is at least equal in quality to the interconnection US West provides to itself. This reasoning is consistent with the requirements of 47 U.S.C. §§ 251(c)(2) and (c)(6), as well as the pro-competitive policy of the 1996 Act. App. at 3a-4a.

The WUTC's orders do not permit the competitors to collocate remote switching units in order to perform functions that are not necessary to achieve equal quality interconnection or access to unbundled network elements. *See, e.g.*, Pet. App. 94a-95a. The WUTC also expressly stated that the competitors would not be allowed to use the remote switching units to avoid paying carrier access charges to US West. *Id.* In fact, during a hearing before the WUTC commissioners in the AT&T proceeding, counsel for US West said the company would concur in the WUTC staff's recommendation to require collocation of remote switching units so long as AT&T would not use the equipment to avoid paying access charges. App. at 10a. By limiting the collocation of remote switching units to functions necessary for interconnection or access to unbundled network elements, the WUTC correctly implemented the requirements of 47 U.S.C. §§ 251(c)(2) and (c)(6).

When a state commission includes a collocation provision in an interconnection agreement that permits competitors to obtain "equal quality" interconnection, that

provision "meets the requirements of" 47 U.S.C. § 251(c)(6). *See* 47 U.S.C. § 252(e)(6). Therefore, the Ninth Circuit properly decided that the 1996 Act does not prohibit such a provision, and this Court should decline to review that decision.

## III. The Ninth Circuit Did Not Expand the Role of State Commissions Under the 1996 Act, Nor Did It Disable Federal Court Review of Agreements Or Threaten The Primacy of Federal Law.

In its petition, US West argues that the Ninth Circuit, by affirming provisions of interconnection agreements beeause they do not violate the 1996 Act, has surrendered federal court review over state commission determinations, and has otherwise upset the primacy of federal law. Pet. at 20-21. This argument has no merit.

### A. The WUTC Lawfully Exercised Its Broad Responsibilities Under the 1996 Act and The Ninth Circuit Properly Reviewed and Affirmed the WUTC's Decisions.

Contrary to US West's arguments, Congress created a considerable role for state commissions in implementing the local competition provisions of the 1996 Act. For example, state commissions are authorized to arbitrate open issues that parties to an interconnection agreement cannot successfully negotiate. 47 U.S.C. § 252(b). With respect to these disputed issues, state commissions must set the particular terms, conditions, and prices in a way that meets the requirements of the 1996 Act. *Id.* §§ 252(c) and (d). All interconnection agreements, whether they are reached through arbitration, negotiation, or both, must be approved by the state commission. *Id.* § 252(e)(1).

In addition, the 1996 Act contemplates that state commissions may impose requirements that are a function of state law in their review and approval of interconnection agreements. *See* 47 U.S.C. § 251(d)(3) (state commissions

may enforce state policies that establish access and interconnection obligations of telecommunications companies that are consistent with the requirements of Section 251 and do not substantially prevent the implementation of Section 251 and the purposes of the Act); 47 U.S.C. § 252(e)(3) (state commissions may establish or enforce state law requirements when reviewing interconnection agreements). In passing the 1996 Act, Congress did not assign to state commissions the token role US West urges this Court to adopt. Rather, Congress established a scheme under which state commissions would have the primary role in implementing the interconnection agreements in which the incumbents' specific obligations are embodied.

The 1996 Act requires US West to make unbundled network elements available to competitors and also requires US West to allow competitors to collocate on its premises equipment necessary for interconnection or access to unbundled network elements. 47 U.S.C. §§ 251(c)(3); (6). Currently, there are no binding FCC rules requiring incumbents to combine network elements or to allow collocation of remote switching units. Therefore, US West argues that the WUTC, by imposing these requirements in the agreements, has created "new regulatory obligations out of whole cloth," and faults the Ninth Circuit for what it calls a "hands off approach" in reviewing the agreement. Pet. at 22-23. This argument is not supported by the record or the Ninth Circuit's decision and should be rejected.

The combination provisions in the agreements are consistent with the 1996 Act and with this Court's decision in *AT&T Corporation*. At the time the WUTC imposed the combination provision, incumbents were required by the FCC to combine elements, *see* 47 C.F.R. § 51.315(c)-(f), but the Eighth Circuit ultimately vacated the FCC requirement. Therefore, the Ninth Circuit's task was to decide whether, in the absence of an FCC rule mandating combination, a

provision requiring US West to combine elements violates the Act. *MCI Telecommunications Corp.*, 204 F.3d at 1268; Pet. App. 9a. The Ninth Circuit decided that such provisions do not violate the Act based on this Court's interpretation of 47 U.S.C. § 251(c)(3) in *AT&T Corporation*. *Id.* *See AT&T Corp.*, 525 U.S. at 394. The Ninth Circuit's decision to affirm the combination provisions in the interconnection agreements hardly results in the creation of a federal obligation "out of whole cloth."

Likewise, US West's argument that the WUTC disregarded federal law by requiring US West to collocate remote switching units fails. The WUTC imposed the requirement in order to facilitate equal quality interconnection for MCI and AT&T. The fact that the D.C. Circuit vacated the FCC's definition of "necessary" does not change the nature of the WUTC's collocation requirement. The WUTC's decision that collocation of remote switching units is necessary for equal quality interconnection is based on 47 U.S.C. § 251(c)(6) as well as on the pro-competitive policy of the Act.

In providing for federal court review of state commission determinations, Congress sought to ensure that arbitrated provisions in interconnection agreements comply with the 1996 Act. 47 U.S.C. § 252(e)(6). The very fact of US West's petition belies its claim that the Ninth Circuit has disabled federal court review over agreements. The Ninth Circuit reviewed the agreements and determined that they meet the requirements of the 1996 Act, which is exactly what Congress had envisioned.

In affirming the collocation provisions, the Ninth Circuit was cognizant of the implications of the FCC's overly broad definition of "necessary." *MCI Telecommunications Corp.*, 204 F.3d at 1269; Pet. App. 10a. However, the court also recognized that, unlike the D.C. Circuit, it was not reviewing a rule that could impose unfettered obligations on incumbents. *Id.* Rather, the Ninth Circuit reviewed the

decision of a state commission to impose a very limited collocation requirement on US West. Finding that the provision does not violate the Act, the Ninth Circuit correctly affirmed it. This Court should deny US West's Petition.

### B. The Ninth Circuit Did Not Dismantle the Federal Courts' Jurisdiction to Review Interconnection Agreements Or Unravel the Primacy of Federal Law.

The Ninth Circuit's decisions to affirm the two requirements at issue do not upset the primacy and uniformity of federal law. US West complains that the decisions will result in obligations that "vary from state to state." Pet. at 24. However, the 1996 Act does not contemplate a single, national interconnection agreement to which all incumbents and competitors must adhere. Instead, the 1996 Act provides for the arbitration of issues by individual state commissions. 47 U.S.C. § 252(b). The 1996 Act further authorizes state commissions to impose state law obligations on parties to interconnection agreements. *Id.* at § 252(e)(3). Review of interconnection agreements will be undertaken by many federal district courts, which are not bound by the decisions of other federal courts. *See id.* § 252(e)(6). In addition, when an agreement (or provision) is reached entirely through negotiation, it need not meet the requirements of the 1996 Act at all. In short, the 1996 Act does not contemplate that interconnection agreements necessarily will be uniform.

The Ninth Circuit reviewed the interconnection agreements to determine whether they "meet the requirements" of the 1996 Act. This is exactly what the 1996 Act requires. In its review, the Ninth Circuit did nothing to upset the federal judiciary's authority to review interconnection agreements for consistency with federal laws. The Ninth Circuit did not negate the primacy of federal law. In sum, certiorari by this Court is unnecessary.

## CONCLUSION

For the foregoing reasons, the WUTC requests that this Court deny US West's Petition for a Writ of Certiorari.

October 10, 2000

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# APPENDIX A

[Open Meeting Memorandum prepared by WUTC Staff, March 5, 1997.]

Agenda: March 5, 1997

Item: 4A

Docket: **UT-930309**

Companies: AT&T Communications, Inc.
and US WEST Communications, Inc.

Staff: Jing Roth, Regulatory Consultant
Glenn Blackmon, Assistant Director - Telecommunications
Dave Griffith, Telecommunications Engineer
Larry Berg, Review Judge

**Recommendation:**

1. Grant in part and deny in part AT&T Communications, Inc.'s request for modification.

2. Deny US WEST Communications Inc.'s request for partial rejection and modification.

3. Reject the agreements as filed and order the parties to refile in compliance with staff's recommendations within 60 days.

Discussion

On March 1, 1996, AT&T Communications of the Pacific Northwest, Inc. ("AT&T") requested negotiations with US WEST Communications, Inc. ("USWC") for interconnection under the terms of the Telecommunications Act of 1996 ("the Act" or "1996 Act"). On July 25, 1996, AT&T filed with the Commission and served on USWC a request for arbitration pursuant to the 47 USC § 252(b)(1). The Commission designated the petition as Docket No. UT-960309 and appointed Simon J. ffitch to arbitrate the disputed issues in this case. Hearings were held on October 21 and 22, 1996, evidence was considered, and on November 27, 1996, the arbitrator issued the *Arbitrator's Report and Decision* ("Report") relating to this docket. On February 4, 1997, the Arbitrator issued a supplemental Report clarifying the Report and Decision in regard to two issues: payphone resale and customer transfer charges. David Griffith, Glenn Blackmon and Jing Roth of the commission's telecommunications section staff participated in the arbitration hearings and advised the arbitrator in preparing the Report.

Under the terms of the Commission's *Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements, under the Telecommunications Act of 1996* ("Interpretive Statement"), issued in Docket UT-960269, the companies submitted interconnection agreements on February 11, 1997. Agreements containing both arbitrated and negotiated provisions are subject to a 30 day deadline specified in the Act, which in this case is March 13, 1997. The Commission may either approve or reject the agreements, with written findings as to any deficiencies.

AT&T's Request for Modification

In its memorandum requesting approval, AT&T asks that the *Arbitrator's Report and Decision* be modified in two areas: (a) avoided cost discount rate, and (2) collocation of remote

switching units ("RSU"). It is worth noting that on December 6, 1996, AT&T also filed a petition for partial reconsideration of the same issues it has raised here. In the supplemental order, the arbitrator reconsidered two of the issues relating to payphone and customer transfer changes. Staff believes that the arbitrator has correctly decided these two issues in the supplemental order.

. . . .

Types of collocated equipment – switching

During the arbitration, AT&T requested the ability to place Remote Switching Units ("RSU") in collocated space. USWC stated that switching equipment is not required to be collocated because it does not meet the "necessary" requirement in the FCC's First Order and Report, CC 96-98, August 8, 1996 ("Order"). The arbitrator adopted USWC's position given that the record established that the RSU would primarily be used for switching function rather than interconnection.

Staff feels that arguments in favor of having RSUs collocated in an ILECs central office extend beyond just the legal interpretations of the FCC Order and the Act. First, the Act clearly intends to promote competition, and seeks to do so by encouraging collocation of carriers' facilities at "technically feasible" points, and in an efficient manner. In denying collocation of RSUs, the Commission requires that CLECs must accept some or all unbundled loop elements at the voice frequency level in one of the ILEC's central offices for transport to an CLEC's office for switching. The CLEC would be compelled to find an adequate switching equipment location near the C.O. This requirement puts the CLECs at a competitive disadvantage from both a cost and technical performance standpoint.

Technical standards are based on having a specific set of cable gauges (thickness of the copper) designed for each office, depending on the distance the customers are located from the central office. Thus loop lengths are specifically designed to conform to the requirements associated with the location of the central office and switch that they currently serve. An unbundled loop will remain within the service standards expected for local telephony as long as that loop terminates on a switch located in the same central office. Requiring CLECs to extend loops to another location will degrade service for that customer to some extent. Whether a customer notices this change will depend largely on what is needed to extend the loop to another location, be it more copper, additional loop electronics, etc., with the most significant factor being the length of the new loop. In addition, to the potential for noticeable service degradation, each extension will have an associated cost, therefore, making this service less competitive relative to the incumbent LEC.

The only desirable technical solution is to allow a CLEC the option to collocate a remote switching unit along with its other collocatable equipment in the ILECs central office. Allowance for collocation of RSUs in the incumbent's central offices will at least give CLECs the opportunity to avoid extending loops if it is not feasible for them to find a adequate switching equipment location in the same area as an incumbent's central office. Limiting the option to RSUs, means CLECs will have to maintain their large class 5 machines on their own premises. With the RSU alternative CLECs may substitute switching devices in ILEC's central offices in place of extra, possibly inefficient, electronics equipment needed for back to back arrangements. The use of RSUs should also reduce the need for extensive back hauling in the trunking network to reach the CLECs class 5 switch. To the extent possible, CLECs are encouraged to use RSU types that are capable of using direct trunking arrangements to nearby switch locations of the incumbents in order to lessen usage of the incumbent company's interoffice trunking network and local tandem switches for transporting calls.

Therefore, staff recommends that the arbitrator's decision be modified to allow collocation of AT&T's RSUs in USWC's end offices. As part of this modification staff also stipulates that contract language be modified such that AT&T will not be permitted to collocate fully equipped switching equipment (host class 5 switches), and may not use collocated RSUs to avoid payment of access charges. AT&T and USWC are encouraged to establish procedures, including an audit mechanism, that will guarantee that AT&T is not using RSUs for the purpose of bypassing access charges.

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## APPENDIX B

[Excerpt from Transcript of June 25, 1997 Open Meeting before WUTC to consider approval of interconnection agreement between US West Communications, Inc. and AT&T Communications of the Pacific Northwest, Inc.]



BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

| | |
|---|---|
| In the Matter of the Petition for Arbitration of an Interconnection Agreement Between | DOCKET NO. |
| AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., and U.S. WEST COMMUNICATIONS, INC. | UT-960309 VOLUME VIII PAGES 1112-1171 |
| Pursuant to 47 USC Section 252 | |

A hearing in the above matter was held on June 25, 1997, at 1:30 p.m. at 1300 South Evergreen Park Drive Southwest before The Washington Utilities and Transportation Commission.

The parties were present as follows:

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, by DAN WAGGONER, Attorney at Law, 1501 Fourth Avenue, Suite 2600, Seattle, Washington 98101.

U.S. WEST COMMUNICATIONS, INC., by LARRY BROTHERSON, 7800 East Orchard Road, Suite 390, Englewood, Colorado 80111.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION STAFF, by JING ROTH, GLENN BLACKMON, and JEFF GOLTZ, 1300 South Evergreen Park Drive Southwest, Olympia, Washington 98504.

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(COLLOQUY)
PROCEEDINGS

CHAIRMAN NELSON: This is a continuation of this morning's open meeting, we will resume order. We are here on the matter of the interconnection agreement between AT&T and U.S. West . . .

. . . .

MR. WAGGONER:

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So those are the areas we would like to ask you to modify the contract and the arbitrator's recommendation. Let me start

with remote switching units, I think that can be relatively quick because that's an issue you have heard about quite a bit before and which has been extensively addressed in the Staff's earlier memo. We believe that remote switching units properly are co-located in U.S. West premises subject to the recommendations of Staff, that they be of limited size, and that they not be employed to avoid carrier access charges. The record in this case demonstrates that they increase efficiency in the sense that they avoid unnecessary use of trunking in some situations, and they also enhance the reliability of the network because if you are able to co-locate a remote switching unit, if the trunking between the

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remote switching unit and the main switching unit breaks down, the remote switching unit can provide some limited essentially intra-office type switching.

So it is both more efficient in the sense of avoiding over-use of inter-office trunking and it also enhances

reliability. And those are the two main points which I believe have caused Staff to recommend, their recommendation, and we are quite content with the limitations contained in Staff's recommendation. So that's that issue.

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MR. BROTHERSON: I believe, as Mr. Waggoner laid out, the procedure I'm going to respond at this time to the issues he has raised, then bring up others secondarily on our motion to reconsider. I would also second Mr. Waggoner's statement that we also have raised a lot of detail in our brief, both sides have briefed these issues heavily, so I think while we want to touch on these expediently for the hearing today, we would certainly encourage that the additional argument set forth be taken into consideration. Based on a lot of dispute around RSU has dealt with it's ability to bypass access and our concerns

around that area based on AT&T's representations today that they concur with the Staff's, I think it was March 5th memo, and the language in there about not being available for access bypass. I think we too could concur with the Staff's memorandum on that, so I don't think that's an issue.

. . . .